Supreme Court, U.S.
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No. 98-1326

In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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5 pp

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner wishes to draw to this Court's attention a number of relevant developments that have occurred since the filing of the petition for certiorari on February 18, 1999. The filing of this supplemental brief is made necessary by the Solicitor General's strategic decision, on February 26, to waive a response to the petition for certiorari in this case.

1. On February 23, 1999, the United States Court of Appeals for the Sixth Circuit issued its decision in *United States* v. *Page*, 1999 U.S. App. LEXIS 2696 (6th Cir.), upholding a conviction for "interstate domestic violence" under 18 U.S.C. § 2261(a)(2), by the 8-8 vote of an equally divided en banc court. This was one of the two pending en banc cases raising VAWA's constitutionality under the Commerce Clause that were discussed in the petition for certiorari (at 5, 9, 20-21), and the only pending en banc case that involved a criminal provision of VAWA. *Brzonkala* v. *Virginia Polytechnic Inst.*, 132 F.3d 949, 977 (4th Cir. 1997), vacated and reh'g en banc granted (Feb. 5, 1998), which has been pending before the Fourth Circuit en banc for more than a year, involves VAWA's private right of action for damages (42 U.S.C. § 13981). See Pet. 19-24 (explaining why this case presents a better vehicle than *Brzonkala* for deciding the Commerce Clause issue and for addressing the continuing federalization of traditional state law crimes).

As predicted (Pet. 20-21), the Sixth Circuit's fractured en banc decision in *Page* largely turns on a disagreement over statutory construction. Page's conviction rested on 18 U.S.C. § 2261(a)(2), which makes it a crime to "cause[] a spouse or intimate partner to cross a state line * * * by force, coercion, duress, or fraud and, in the course of or as a result of that conduct, intentionally commit[] a crime of violence and thereby cause[] bodily injury." Pet. App. 30a-31a. Eight judges took the view that this language covers a situation where the defendant engages in violence *before* the crossing of a state line, where such violence is integrally related to the forcible transportation of the victim or where the victim's existing injuries are aggravated during such transportation. *Page*, 1999 U.S. App. LEXIS 2696, at *8-32 (opinion of Moore, J.). Eight other judges adopted a narrower construction of the statute under which pre-crossing violence is

rarely, if ever, covered. See *id.* at *39-50 (opinions of Kennedy, Ryan, and Wellford, JJ.).[1]

Page is important for several reasons. First, it confirms that this case is the best vehicle by which to examine the constitutional validity of Section 2261 of VAWA. Unlike *Page*, this case would not require the Court to address any issue of statutory construction that might conceivably moot the constitutional question. Second, now that the Sixth Circuit has issued its en banc decision, there is no longer any plausible argument that review should be denied here because this Court should wait for *Page*. Third, the decision in *Page* strongly confirms the need for this Court's intervention if *Lopez* is not to be rendered a dead letter. In *Page*, only Judge Wellford acknowledged the "overarching change in Commerce Clause analysis wrought by *Lopez*." *Page*, 1999 U.S. App. LEXIS 2696, at *53 (Wellford, J., dissenting). All of the remaining members of the en banc court rejected the Commerce Clause challenge based on only the most cursory reasoning. See, *e.g.*, *id.* at *35 (opinion of Moore, J.) (suggesting that court "would have to hold that *Lopez* overruled" *Caminetti* and other cases in order to invalidate Section 2261(a)(2)).[2]

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[1] The Solicitor General's February 18, 1999 waiver in this case stands in sharp contrast to his previous authorization, in *Page*, of the filing of a request for en banc rehearing on the ground that even what he admitted was an "issue of first impression" in the federal courts concerning the proper interpretation of 18 U.S.C. § 2261(a) was so "exceptionally important" that it merited the attention of all sixteen judges of the Sixth Circuit. See U.S. Pet. for Reh'g With Suggestion for Reh'g En Banc, *United States* v. *Page*, at 1 (Mar. 30, 1998); *id.* at iv (certification of U.S. Attorney on behalf of government that, "based on a reasoned and studied professional judgment," the novel statutory construction question of first impression was "of exceptional importance").

[2] A majority of the en banc court in *Page* also rejected the argument that *Caminetti* is distinguishable because the actus reus of the Mann Act is the interstate transportation itself whereas that is not true of the crime of causing interstate transportation under 18 U.S.C. § 2261(a)(2). See 1999 U.S. App. LEXIS 2696, at *36 (opinion of Moore, J.) ("Congress undoubtedly has the power to criminalize the forcible transportation of a person across state lines."); *id.* at *39 (opinion of Kennedy, J.). As

2. On February 22, 1999, the Ninth Circuit denied rehearing and rehearing en banc in *United States* v. *Mussari*, 1999 U.S. App. LEXIS 2643, a case involving a conviction under the Child Support Recovery Act of 1992 ("CSRA"), 18 U.S.C. § 228. Judge Kozinski, joined in part by Judges T.G. Nelson, Silverman, and Graber, authored a lengthy dissent from the denial of rehearing en banc in which he objected to the panel's decision (see 152 F.3d 1156) to reverse Mussari's conviction on ex post facto grounds not raised below and sharply criticized the panel majority for suggesting that "federal enforcement efforts under the CSRA have run amok." 1999 U.S. App. LEXIS 2643, at *12-13. See 152 F.3d at 1159 ("[I]n choosing among the thousands of persons delinquent in honoring their child support obligations, the government need not show itself an unfeeling monster, or make the law hideous, by selecting as its target an ineffectual worker, plagued by accidents and bad luck, without assets to make any restitution, without children to whom he has any legal connection, and with a present wife and family to whom he has important ties.").

According to Judge Kozinski's dissent, the panel majority's "broad hint that the government ought not to bother us with cases such as this in the future is only the latest wrinkling of the federal judicial nose." 1999 U.S. App. LEXIS 2643, at *15-17 (citing letter from the Hon. J. Clifford Wallace to Chief Justice William H. Rehnquist and quoting the following statement of District Judge Paul G. Rosenblatt during Mussari's trial: "I will go to my grave believing that [the CSRA] is unconstitutional . . . . I thought I'd gotten out of the child support business when I left the state courts. Those were impossible cases to resolve then * * * [and] are equally * * * impossible today."). Judge Kozinski's opinion is reflective of the new pressures and strains that have been placed on the federal judiciary by Congress's recent efforts to create unprecedented federal crimes in the area of domestic relations, an area long regulated exclusively by the States. See Pet. 12-15. It

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previously explained (Pet. 25-26, 30), however, that distinction *does* hold true for Section 2261(a)(1), which does not directly target interstate transportation itself but rather merely adds the element of interstate travel to the traditional state crime of domestic violence in order to federalize it.

also illustrates the pressing need for additional guidance by the Court in this important area of the law.

3. Since the filing of the petition for certiorari, the Administration has announced a series of major new grants to the States and to the District of Columbia to assist state and local governments in *their* efforts to combat domestic violence. See, *e.g.*, *Gore Announces Grants To Help California Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($24,226,782 in grants to prosecutors and other law enforcement officials and to support victim services); *Gore Announces Grants To Help Florida Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($10,110,641 in grants); *Gore Announces Grants To Help Illinois Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($8,211,605 in grants); *Gore Announces Grants To Help New York Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($14,203,593 in grants); *Gore Announces Grants To Help Texas Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($13,397,940 in grants).

The total amount of these new grants by the federal government (which are earmarked for "56 states and territories") is almost a quarter of a billion dollars. Sonya Ross, *Feds Target Violence Against Women*, AP ONLINE, Feb. 26, 1999 ($223 million in grants). These recent actions by the federal government strongly confirm a key submission in our petition (at 30): even if the Commerce Clause does not authorize Congress to federalize the traditional state crime of domestic violence, Congress retains ample power under the Spending Clause to combat domestic violence by assisting the *States* in *their efforts* in this regard.[3]

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[3] Since the filing of the petition, VAWA's criminal provisions and the government's prosecution in this case have come under additional criticism. See Stuart Taylor, Jr., *Irrational Excesses, Barbaric Penalties and Political Opportunism*, THE NATIONAL JOURNAL, Feb. 27, 1999, at 521 (describing petitioner's conviction as involving a "classic state-law murder" case and noting that if the jury had found that petitioner drove to Pearl River, New York not from "a few miles" over the New Jersey border but instead "from Buffalo — a few hundred miles away — there would have been no federal jurisdiction"); *ibid.* ("So wife-beating is now a federal crime, depending on whence the wife-beater arrives at the

4. Since the petition for certiorari was filed, the Administration has suggested that new efforts at the federal level — including possibly new federal criminal proscriptions — might be warranted to address the problem of domestic violence. See Sonya Ross, *Feds Target Violence Against Women*, AP ONLINE, Feb. 26, 1999 (reporting that Vice President Gore has asked Attorney General Reno to review and suggest strategies for combating domestic violence and stalking through the use of the Internet). VAWA's incursion on state prerogatives in the area of domestic relations may thus prove to be only a first step in this new direction.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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scene. As it turns out, husband-killing too."); *ibid.* (arguing that "Congress and the President should ask themselves exactly what purpose it serves to take cases like this, not to mention the more routine domestic spats that sometimes sprawl across state lines, away from the states").

[4] Although dated 1998, the American Bar Association's Task Force Report cited in the petition (at 21-22), see AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998), was in fact publicly released on February 16, 1999, only two days before the petition for certiorari was filed in this case. For the Court's convenience, we have lodged 10 copies of the Task Force's Report with the Clerk. The Task Force was chaired by Edwin Meese III and consisted of a diverse group of luminaries, including Sara Sun Beale, Howell Hefflin, Philip Heymann, Robert Kastenmeier, Robert S. Litt, Barbara Meierhoefer, Jon O. Newman, Otto G. Obermaier, William W. Taylor III, and John K. Van de Kamp.